

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FELICIA JUSTICE,

Plaintiff,

v.

CAROLYN W COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. 3:14-CV-06001-DWC

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of her application for supplemental security income ("SSI") and disability insurance benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 19.

After reviewing the record, the Court concludes the ALJ erred by failing to provide an adequate explanation for why he found Plaintiff did not meet Listing 12.05C. Further, the Court finds outstanding issues must be resolved regarding the degree of Plaintiff's adaptive

1 functioning. Accordingly, this matter is reversed and remanded pursuant to sentence four of 42  
 2 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this Order.

### 3 FACTUAL AND PROCEDURAL HISTORY

4 On January 23, 2012, Plaintiff filed applications for SSI and disability insurance benefits,  
 5 alleging disability as of June 1, 2010. *See* Dkt. 11, Administrative Record (“AR”) 63. The  
 6 applications were denied upon initial administrative review and on reconsideration. *See id.* A  
 7 hearing was held before Administrative Law Judge Glenn G. Meyers (“ALJ”) on June 13, 2013.  
 8 *See* AR 1-47. In a decision dated June 28, 2013, the ALJ determined Plaintiff to be not disabled.  
 9 *See* AR 63-74. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals  
 10 Council, making the ALJ’s decision the final decision of the Commissioner of Social Security  
 11 (“Commissioner”). *See* AR 48-52; 20 C.F.R. § 404.981, § 416.1481.

12 In Plaintiff’s Opening Brief, Plaintiff raises the following issues: (1) Whether the ALJ  
 13 erred in evaluating Plaintiff’s borderline intellectual functioning at Step Three of the sequential  
 14 evaluation process; and (2) Whether remand for payment of benefit is the proper remedy for the  
 15 harmful error in the ALJ’s decision. Dkt. 13, p. 1.

### 16 STANDARD OF REVIEW

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of  
 18 social security benefits if the ALJ’s findings are based on legal error or not supported by  
 19 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
 20 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

### 21 DISCUSSION

22 Plaintiff and Defendant agree the ALJ committed reversible error in evaluating whether  
 23 Plaintiff met Listing 12.05C. Dkts. 13, pp. 2-11; 20. Plaintiff argues the case should be remanded  
 24

1 for payment of benefits, while Defendant argues the case should be remanded for further  
2 administrative proceedings.

3 The Court may remand a case “either for additional evidence and findings or to award  
4 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
5 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the  
6 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
7 Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when  
8 evidence should be credited and an immediate award of benefits directed[.]” *Harman v. Apfel*,  
9 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

10 (1) the ALJ has failed to provide legally sufficient reasons for  
11 rejecting [the claimant’s] evidence, (2) there are no outstanding  
12 issues that must be resolved before a determination of disability  
13 can be made, and (3) it is clear from the record that the ALJ would  
14 be required to find the claimant disabled were such evidence  
15 credited.

16 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

17 At Step Three of the sequential evaluation process, the ALJ considers whether one or  
18 more of the claimant’s impairments meets or equals an impairment listed in Appendix 1 to  
19 Subpart P of the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). Each listing sets forth the  
20 “symptoms, signs, and laboratory findings” which must be established in order for a claimant’s  
21 impairment to meet the listing. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). If a  
22 claimant meets or equals a listing, the claimant is considered disabled without further inquiry.  
23 See 20 C.F.R. § 416.920(d). To meet Listing 12.05C, a claimant must demonstrate “(1)  
24 subaverage intellectual functioning with deficits in adaptive functioning initially manifested  
before age 22; (2) an IQ score of 60 to 70; and (3) a physical or other mental impairment causing

1 an additional and significant work-related limitation.” *Kennedy v. Colvin*, 738 F.3d 1172, 1176  
 2 (9th Cir. 2013).

3 The parties do not dispute the ALJ found Plaintiff’s IQ score, meeting the second 12.05C  
 4 listing requirement. Dkts. 13, 20. Furthermore, neither party disputes the ALJ found Plaintiff  
 5 suffered from additional severe impairments at Step Two, meeting the third 12.05C listing  
 6 requirement. *See e.g. Campbell v. Astrue*, 2011 WL 444783, \*18 (E.D. Cal. Feb. 8, 2011)  
 7 (collecting cases supporting the finding of a severe impairment at Step Two is a *per se* finding of  
 8 an impairment imposing additional and significant work-related limitations). The ALJ did not  
 9 address the first 12.05C listing requirement.

10 To meet the first 12.05 C listing requirement, the claimant must demonstrate her  
 11 impairment “satisfies the diagnostic description” for Listing 12.05 contained in the explanatory  
 12 material for mental disorders under 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.00. *See*  
 13 *Matter v. Colvin*, 2014 WL 7245726, \*3 (W.D. Wash. Dec. 19, 2014) (*citing Foster v. Halter*,  
 14 279 F.3d 348, 354 (6th Cir. 2001)). The Social Security regulations specifically state

15 Listing 12.05 contains an introductory paragraph with the  
 16 diagnostic description for mental retardation. It also contains four  
 17 sets of criteria (paragraphs A through D). If your impairment  
 18 satisfies the diagnostic description in the introductory paragraph  
 19 and any one of the four sets of criteria, we will find that your  
 20 impairment meets the listing.

21 20 C.F.R. Pt. 404, Subpt. P, App. 1. § 12.00(A). To be found disabled under Listing 12.05C,  
 22 therefore, Plaintiff must show she had “significantly subaverage general intellectual functioning  
 23 along with deficits in adaptive functioning initially manifested” prior to age 22. 20 C.F.R. Pt.  
 24 404, Subpt. P, App. 1. § 12.05C. Courts have found circumstantial evidence can infer a deficit in  
 adaptive functioning prior to age 22. *See e.g. Forsythe v. Astrue*, 2012 WL 217751, \*7 (E.D. Cal.  
 Jan. 24, 2012).

1 The record reflects Plaintiff was in special education classes and had dyslexia and  
2 learning difficulties prior to age 22. AR 325. Plaintiff, however, was able to earn a high school  
3 diploma through Job Corp, and her high school transcripts reflect mostly passing grades. AR 28,  
4 271, 325. Based on the age of her children, Plaintiff was raising a child prior to the age of 22. *See*  
5 AR 4, 7 (Plaintiff was 31 on the date of the ALJ hearing and testified to having a 14 year old  
6 child). Plaintiff was able to work part time as a day care teacher's assistant and full time as a  
7 security guard. AR 248-51. Further, Plaintiff told medical professionals she cares for her four  
8 children (ranging from age 1 to 14), cooks, and does the laundry and cleaning. AR 241, 404, 407.

9 The ALJ failed to make findings or discuss whether the evidence shows Plaintiff has  
10 adaptive functioning deficits which initially manifested prior to age 22. *See* AR 68. While there  
11 is evidence of adaptive functioning deficits, the record also contains evidence showing Plaintiff  
12 was able to cope fairly adequately with the responsibilities of everyday life prior to age 22 and  
13 failed to establish the required deficits. Therefore, outstanding issues remain regarding the  
14 degree of Plaintiff's adaptive functioning, and this case must be remanded for further  
15 administrative proceedings to resolve the issues. On remand, the ALJ should reevaluate whether  
16 Plaintiff meets or equals Listing 12.05C by providing adequate discussion of each element of the  
17 listing. *See Matter*, 2014 WL 7245726 (remanding for further administrative proceedings, rather  
18 than benefits, where the plaintiff did not graduate from high school or receive her GED, yet the  
19 ALJ failed to address adaptive functioning prior to age 22 and did not provide adequate  
20 explanation of the IQ scores).

### 21 CONCLUSION

22 Based on the foregoing reason, the Court hereby finds the ALJ improperly concluded  
23 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is REVERSED  
24

1 and this matter is REMANDED for further administrative proceedings in accordance with the  
2 findings contained herein.

3 Dated this 30th day of June, 2015.

4  
5 

6 David W. Christel  
7 United States Magistrate Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24